Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

CHERYL J. HOPWOOD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the University of Texas School of Law have a compelling governmental interest in some limited consideration of race to remedy the present effects of past discrimination or to achieve reasonable ethnic diversity?

2. Can a court of appeals's issuance of "judicial instructions" in place of a formal injunction or declaratory judgment (a) insulate the decision from further review, or (b) support a substantial attorneys' fees award?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Respondents

Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliott
David A. Rogers

Defendants-Petitioners

The State of Texas
The University of Texas Board of Regents
The University of Texas at Austin
The University of Texas School of Law
Patrick C. Oxford, A.W. Riter, Jr., Woody L. Hunt, Charles Miller, Rita Crocker Clements, A.R. Sanchez, Raul R. Romero, and Tom Loeffler, in their official capacities as members of the University of Texas Board of Regents
Donald L. Evans, in his official capacity as a former member of the University of Texas Board of Regents
Larry R. Faulkner, in his official capacity as President of the University of Texas at Austin
M. Michael Sharlot, in his official capacity as former Dean of the University of Texas School of Law
Stanley M. Johanson, in his official capacity as Professor of Law of the University of Texas School of Law

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PETITION FOR WRIT OF CERTIORARI

This case presents fundamental questions about the constitutionality of affirmative action in higher education. The Court should grant this petition because the decision of the court of appeals addresses issues of national significance for higher education on which the lower federal courts are in direct disagreement and exemplifies the lower courts' unsettled understanding of the Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), as well as the proper analysis for remedial, race-conscious state action. Since the Fifth Circuit issued its original *Hopwood* decision five years ago, the tension among the circuits has only increased and has resulted in irrational and unbearable variation in applicable law. The prevailing uncertainty is drawn into sharp relief by the fact that the sheer fortuity of a school's geographic location dictates the governing law on admissions criteria. Due to the great importance

of the issues to the country's public institutions of education, as well as to the larger arena of the States' use of racial classifications, petitioners request that the Court grant this petition.

OPINIONS BELOW

There have been three substantial opinions in the district court and three in the court of appeals, each styled *Hopwood v. Texas*. In the nomenclature adopted by the court of appeals, the three appellate opinions are *Hopwood I*, *II*, and *III*, respectively. The second and third opinions of the district court are *Hopwood A* and *B*, respectively. The first opinion in the district court received no short-form designation. The first opinion in each court dealt with unsuccessful motions to intervene and are not at issue in this petition. The two relevant sets of opinions are reported as follows:

> *Hopwood A*, 861 F.Supp. 551 (W.D. Tex. 1994) (Pet. App. 1a-72a), *rev'd*, *Hopwood II*, 78 F.3d 932 (CA5) (Pet. App. 73a-150a), *reh'g en banc denied*, 84 F.3d 720 (CA5) (Pet. App. 151a-162a), *cert. denied*, 518 U.S. 1033 (1996).
>
> *Hopwood B*, 999 F.Supp. 872 (W.D. Tex. 1998) (Pet. App. 163a-268a), *aff'd in part and rev'd in part*, *Hopwood III*, 236 F.3d 256 (CA5 2000) (Pet. App. 273a-318a). In an unreported order, the court of appeals denied both sides' petitions for rehearing en banc. Pet. App. 319a-321a.

JURISDICTION

The court of appeals entered judgment on December 21, 2000. It denied timely petitions for rehearing en banc on January 17, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

Title VI of the Civil Rights Act of 1964 provides:

> No person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d.

STATEMENT OF THE CASE

Respondents are unsuccessful applicants for admission to the University of Texas School of Law. They filed this action alleging that they were denied admission because of their race. The district court had jurisdiction under 28 U.S.C. §§1331 and 1343.

After an eight-day trial, the district court held that the law school's consideration of race in admissions served compelling interests in maintaining a diverse student body and in overcoming the effects of past discrimination by the law school and by other units of public education in Texas. *Hopwood A*, 861 F.Supp., at 569-73. The district court interpreted the law school's claims of compelling interest in light of the State's "affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system." *Id.*, at 571 (citing *United States v. Fordice*, 505 U.S. 717 (1992)).

Texas's system of public education, including the law school, has a long history of discrimination against minority students at all levels. *Id.*, at 554-57, 571-73. The State believes that it has rid itself of overt discriminatory practices, but vestiges of its past discrimination remain. The present effects of past discrimination

are especially evident in the racial identifiability of the pool of applicants who meet the demanding competitive admissions criteria at its most selective institutions of higher education, including the law school. For over twenty years, the Department of Education's Office for Civil Rights (OCR) has demanded that the university and the law school take affirmative, race-conscious measures to eliminate the current effects of past discrimination in Texas's public education system. *Id.*, at 556-57. OCR's enforcement actions were directed in part by orders of the United States District Court for the District of Columbia, which held in 1983 that Texas had not yet adopted a sufficient plan for desegregating higher education. *Id.*, at 556.

The district court found that many Texans in the pool of potential law students had attended segregated schools, and that "this segregation has handicapped the educational achievement of many minorities" and constricted the pool of qualified minority applicants to the law school. *Id.*, at 573. More than forty Texas school districts remained under judicial supervision in desegregation litigation when this case was tried in 1994 (and when the law school class of 2016 entered kindergarten). *Id.*, at 554.

The district court also found that the legacy of the law school's own segregation continued to shape minority attitudes toward the law school, as evidenced by the racial identity of the applicant pool and the reluctance of minority applicants to accept offers of admission. *Id.*, at 572-73. The law school was segregated *de jure* for many decades, *see Sweatt v. Painter*, 339 U.S. 629 (1950), and then segregated *de facto* by its rising admission standards. The law school's first experiments with affirmative action admitted too many weak students and were abandoned. *Hopwood A*, 861 F.Supp., at 557. The immediate consequence of abandoning affirmative action was that in 1971, the law school's entering class of more than 500 students contained *zero* blacks. *Id.*, at 558, 573 n.66.

Beginning in the 1970s, the law school developed admissions procedures designed to remedy the effects of past discrimination and enhance the diversity of the student body while preserving highly selective criteria for admission. Details of the plan changed from year to year, but the law school consistently sought to admit additional black and Mexican-American students who were well-qualified but would not otherwise be admitted to the law school. *Id.*, at 557-63, 582 n.87. Over time, as the pool of minority applicants became stronger, the law school gradually reduced its reliance on racial preferences. *Id.*, at 560 n.18, 575 & n.69. "The applicants selected for admission come from a relatively narrow band within the full range of scores." *Id.*, at 563. Preferring minorities within that band substantially increased minority enrollment with negligible impact on the academic strength of the class as a whole and only modest impact on any other applicant's individual chances for admission.[1]

The district court found that eliminating all consideration of race in admissions would lead directly to "resegregating the law school," and to a large majority of Texas minority law students attending Texas Southern University, the "separate-but-equal" law school created by Texas in the 1940s to avoid desegregation. *Id.*, at 573 & n.66; *see Sweatt*, *supra*. The district court also found substantial educational benefits from racial and ethnic diversity in law school classrooms. *Hopwood A*, 861 F.Supp., at 571. Based on these findings, and on this Court's judgment in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the court held that considering race in admissions served compelling interests in remedying the effects of past discrimination and in achieving educational diversity.

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[1] *See Hopwood B*, 999 F.Supp., at 886 n.29 (setting out testimony and data showing small anticipated increases in admission rates for nonpreferred applicants in the absence of affirmative action).

The district court invalidated certain details of the law school's 1992 admissions program, holding that the school's procedures were not narrowly tailored to serve the identified compelling interests. *Hopwood A*, 861 F.Supp., at 578-79. The law school had already corrected these features of its program, *id.*, at 582 & n.87, and did not appeal this aspect of the district court's decision. Plaintiffs appealed the district court's denial of their request for an injunction prohibiting all consideration of race.

The court of appeals reversed, forbidding "*any* consideration of race" in admissions, *Hopwood II*, 78 F.3d, at 948 n.36 (emphasis added), "even as part of the consideration of a number of factors," *id.*, at 946, 962. The court of appeals did not overturn the district court's findings on any of the facts summarized in this petition; instead, it rejected the relevance of those facts. The court of appeals held that the law school may remedy only its own discrimination, and that discrimination against minority applicants by other public education entities in Texas is mere "societal discrimination," beyond the State's power to address with race-conscious means. *Id.*, at 949-52. The court also concluded that the principal continuing effects of past discrimination by the law school—the limited number of minority applications, the resulting low minority matriculation rate, and the law school's reputation in the minority community—are irrelevant and cannot justify even limited consideration of race in admissions. *Id.*, at 952-54. The court further held that the law school's interest in racial and ethnic diversity is irrational, *id.*, at 945, and that its constitutional duty to eliminate all vestiges of past discrimination is irrelevant to this case, *id.*, at 954-55.

The court of appeals relied heavily on contract set-aside cases such as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and employment cases like *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), while rejecting the relevance of the Court's higher education cases. The court refused to follow *Bakke* because

there was no majority in that case for any single governmental interest justifying affirmative action and because the court of appeals believed that *Bakke* had been implicitly overruled by subsequent decisions. *Hopwood II*, 78 F.3d, at 944-45. The court of appeals rejected the relevance of *United States v. Fordice*, 505 U.S. 717 (1992), holding that *Fordice* did not modify earlier cases such as *Croson*, and that the duty to eliminate all vestiges of segregation in higher education means only that the law school may address the (narrowly defined) effects of its own past discrimination—not that it may or must address the effects of discrimination by other actors in the Texas educational system. *Hopwood II*, 78 F.3d, at 955.

The court of appeals issued a detailed "judicial instruction" to defendants:

> [I]t is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

Id., at 958. It followed the instruction with the threat of "actual and punitive damages" if the law school did not comply. *Id.*, at 959. Yet it declined to order that defendants be enjoined, "as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion." *Id.*, at 958. After the closely divided court denied rehearing en banc, Pet. App., at 151a-162a, this Court denied certiorari. 518 U.S. 1033 (1996).

After a four-day second trial on remand, the district court enjoined the law school from any consideration of race in

admissions. *Hopwood B*, 999 F.Supp., at 923. The district court found that none of the plaintiffs would have been admitted to the law school under a race-neutral system of admissions, but awarded $704,000 in attorney's fees after awarding only nominal damages. *Id.*, at 901, 923-24. Both sides appealed.

The court of appeals affirmed the denial of actual damages. *Hopwood III*, 236 F.3d, at 263-72. It repeated and reaffirmed its earlier "judicial instruction" prohibiting any consideration of race in law school admissions, *id.*, at 273-74, and concluded that *Hopwood II* did not squarely contradict any decision of this Court, and thus was not "dead wrong." *Id.*, at 272-76.

The court of appeals reversed the injunction against any consideration of race, but primarily on procedural grounds. It remanded for findings of fact and conclusions of law explaining the necessity of the injunction. *Id.*, at 276-77. The court also decided that by prohibiting any consideration of race, the injunction went beyond *Hopwood II*'s "judicial instruction" forbidding consideration of race for any of four stated reasons. *Id.* But because the four reasons encompassed all the reasons why the law school might consider race in admissions, and were plainly so understood in both *Hopwood II* and *Hopwood III*, there was no practical difference between the court of appeals's "judicial instruction" and the district court's injunction.

With the reversal of the injunction, plaintiffs were left with no actual damages, no order of admission, and no formal injunction or declaratory judgment controlling the future behavior of the law school. Even so, as a practical matter the court of appeals's "judicial instruction" ended all consideration of race in the law school's admissions decisions by direct judicial order, and by its deterrent effect eliminated all consideration of race in admissions or financial aid anywhere in public higher education in Texas. Based on that, the court of appeals held that plaintiffs had achieved

prevailing-party status with *Hopwood II* and affirmed the substantial award of attorneys' fees. *Id.*, at 277-78.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Conflict with *Bakke*. The court of appeals's blanket prohibition of any consideration of race in admissions conflicts with the only clear holding of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Bakke* is the Court's only decision on the merits of affirmative action in higher education, and it directly controlled this case. Although *Bakke* was a fractured decision, a majority of the Court united in one clear holding (in Part V(C) of the lead opinion) that universities may take race into account in admissions:

> "In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." *Id.*, at 320 (opinion of the Court per Powell, J.).

See also id., at 328 (opinion of Brennan, J., joining in Part V-C of Justice Powell's opinion). That is the holding in *Bakke*, and the Court has never overruled it. *Bakke* reversed an injunction, substantially identical to the "judicial instruction" issued by the court of appeals in this case, that prohibited any consideration of race in admissions. Because members of the *Bakke* majority relied on different justifying compelling interests, the court of appeals refused to follow *any* of *Bakke*'s rationales, and thus refused to abide by the Court's judgment.

Unable to distinguish *Bakke* on the facts, the court of appeals openly rejected *Bakke*'s authority as law. *Hopwood II*, 78 F.3d, at 944-45; *see also Smith v. Univ. of Washington*, 233 F.3d 1188, 1200 n.9 (CA9 2000) (noting conflict with *Bakke*), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) (No. 00-1341); *Wessmann v. Gittens*, 160 F.3d 790, 795 (CA1 1998) (same); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 820-21 (E.D. Mich. 2000) (same). And in *Hopwood III*, even with the passage of time for reflection, the court of appeals declined to reconsider the first panel's disregard of *Bakke*. 236 F.3d, at 274-75. Now district courts have also begun to hold that *Bakke* is not authority they are bound to respect. *See, e.g., Grutter v. Bollinger*, No. 97CV75928-DT, 2001 WL 293196, at *45 (E.D. Mich. Mar. 27, 2001) (enjoining consideration of race in admissions to University of Michigan Law School); *Johnson v. Board of Regents of Univ. Sys. of Ga.*, 106 F.Supp.2d 1362, 1367-69 (S.D. Ga. 2000) (invalidating consideration of race in admissions to University of Georgia); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 32 F.Supp.2d 619, 628-29 (W.D.N.Y. 1999) (relying on *Hopwood II* and rejecting racial diversity of student body as legitimate governmental interest), *rev'd*, 212 F.3d 738 (CA2 2000).

The Fifth Circuit has put the status of *Bakke* in controversy. *See, e.g., Hopwood II*, 78 F.3d, at 944-45 ("[T]he *Bakke* Court did not express a majority view and is questionable as binding precedent."). If *Bakke* is still good law, this Court must say so. If *Bakke* is to be modified or overruled, *only* this Court can say so. Whatever the ambiguities of the opinion, and whatever seemingly discernible hints may have followed in subsequent decisions on affirmative action in other contexts, *Bakke* is the decision that most directly governs affirmative action in education, and the lower courts remain bound by it until the Court expressly says otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

B. The Conflict in the Lower Courts over Diversity. By refusing to respect the authority of *Bakke*, the Fifth Circuit has also brought itself into square conflict with other circuits. In *Smith v. University of Washington Law School*, the Ninth Circuit held that *Bakke* is good law, that diversity is a compelling interest in higher education, and that "a properly designed and operated race-conscious admissions program" at the University of Washington's law school would not be in violation of Title VI or the Fourteenth Amendment. 233 F.3d, at 1201. Both the Fifth and Ninth Circuits expressly recognized their conflict. *See id.*, at 1200 n.9 ("We acknowledge that *Hopwood [II]* decided to the contrary."); *Hopwood III*, 236 F.3d, at 275 n.66 ("We respectfully disagree . . . with the Ninth Circuit's holding that Justice Powell's diversity rationale is binding Supreme Court precedent.").

The division in the lower courts is further evidenced by courts' disagreement with the Fifth Circuit's holding that consideration of race is limited to remedial interests. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752-53 (CA2 2000) (reduction of racial isolation resulting from *de facto* segregation can be compelling interest, even when not caused by school district); *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061 (CA9 1999) (recognizing as a compelling state interest the operation of a research-oriented elementary "lab" school aimed at improving urban education); *Wittmer v. Peters*, 87 F.3d 916, 919, 921 (CA7 1996) (holding effective management of prison boot camp compelling governmental interest, justifying race-conscious hiring); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906-07 (CA3 1984) (upholding voluntary race-conscious teacher assignments in light of school system's *de facto* segregation); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 816-24 (E.D. Mich. 2000) (rejecting *Hopwood II* and finding that diversity in higher education is a compelling interest that can justify narrowly tailored consideration of race in admissions). It remains true that "[i]n the education context, *Hopwood* is the only appellate court to have

rejected diversity as a compelling interest." *Wessman*, 160 F.3d, at 795; *see also Brewer*, 212 F.3d, at 748 ("the Fifth Circuit is the only circuit since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context"); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (CA4 1999) ("The only circuit to hold that diversity is not a compelling interest is the Fifth"), *cert. dismissed*, 529 U.S. 1050 (2000).

Some circuits have avoided the head-on conflict by opting not to rely on the lack of a compelling interest and considering instead whether States have narrowly tailored their programs to a presumed interest. *See, e.g., Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123, 130 (CA4 1999) (noting that "whether diversity is a compelling interest remains unresolved, and in this case, we also choose to leave it unresolved"); *Wessman v. Gittens*, 160 F.3d 790, 796 (CA1 1998) (concluding that it "need not definitively resolve this conundrum today" and deciding case on alternative grounds); *Lutheran Church-Mo. Synod v. F.C.C.*, 141 F.3d 344, 354, 356 (CADC 1998) (commenting that it did "not think diversity can be elevated to the 'compelling level'" but striking down challenged regulation on narrow-tailoring grounds). This approach has inevitably led to extensive analysis of factual matters to ascertain whether a classification is narrowly tailored, while governmental purposes go unexamined and States remain without guidance on proper compelling interests.

In rejecting the law school's diversity interest, the court of appeals relied on decisions by the Court that say next to nothing about education, and that do not undermine *Bakke*. The court of appeals did not appropriately consider either the Court's deference to education officials' design of academic policy, *see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), or the special significance diversity takes on in the school setting. As the Court

put it in *Brown v. Board of Education*, education is "the very foundation of good citizenship" and "a principal instrument in awakening the [student] to cultural values." 347 U.S. 483, 493 (1954). Diversity is a critical tool for schools in their function as "an assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground . . . inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (quotations and citation omitted); *see also Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (expressing similar view). Such benefits are simply lacking and often impossible in other contexts, such as broadcasting, employment, or industry contracting. In the school setting, by contrast, people from different backgrounds are intermingled in a learning environment. As Justice Powell made the common-sense recognition in *Bakke*, "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S., at 313 (opinion of Powell, J.) (quotation and citation omitted).

The academic benefits of a student body representing differing ideas, values, backgrounds, and life experiences are widely recognized. *See, e.g., Sweatt*, 339 U.S., at 634 ("The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."); *Gratz*, 122 F.Supp.2d, at 822-23 (reviewing expert evidence of racial diversity's contributions to school and students). The court of appeals inappropriately and bluntly applied the Court's conclusions regarding the financial windfall of contract set-asides to the *Bakke* benefits of an enriched academic life.

C. The Conflict over Remedying Past Discrimination and Preventing Racial Identifiability. The Court has recognized a State's interest in remedying past discrimination. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (stating that there is "a compelling interest in remedying past and present discrimination"). Yet the court of appeals's severe limitations on the law school's remedial use of race strictly limited the State's ability to accomplish that interest. *Hopwood II* confined its inquiry into past discrimination to the acts of a single academic department and held that discrimination in public education in earlier years of a student's life is mere societal discrimination that the law school must ignore. 78 F.3d, at 949-52. That decision squarely conflicts with *Geier v. Alexander*, 801 F.2d 799 (CA6 1986), in which the Sixth Circuit upheld consideration of race in admissions to the University of Tennessee Law School:

> "Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years . . . . The consent decree in this case does not seek to remedy some amorphous 'societal' wrong. It is directed solely at the continuing effects of past practices that adversely affected black Tennesseans as they moved through the public school systems and the higher education systems of the state." *Id.*, at 809-10.

For the first time in American history, a formerly segregated state institution has been prohibited from any ameliorative consideration of race in attempting to remedy past discrimination in the State's public education system. The judgment below is thus in substantial tension with *United States v. Fordice*, 505 U.S. 717 (1992), which clearly emphasized that the inquiry must extend to

the whole state: "*[T]he State* of Mississippi had the constitutional duty to dismantle the dual school system that its laws once mandated. . . . Thus we have consistently asked whether existing racial identifiability is attributable to *the State* . . . ." *Id.*, at 727-28 (emphasis added).

The Fifth Circuit's holding that the State is confined to race-neutral admissions policies in its efforts to remedy the present effects of past discrimination and to prevent *de facto* resegregation of the law school is also at odds with *Fordice*:

> "We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely [illegible]ndoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system." *Id.*, at 729.

For similar reasons, the judgment below conflicts with *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (CA2 2000), which expressly rejected *Hopwood II* and held that elimination of *de facto* segregation is a compelling interest that can justify consideration of race in admissions, even when the school has no past history of *de jure* segregation. 212 F.3d, at 745-46, 752-53.

Petitioners believe that the State's interest in affirmative action is at its zenith in selective and formerly segregated institutions of higher education, and that the education cases are thus far more relevant than cases on contract set-asides and other contexts. But the judgment below conflicts even with some portions of the Court's opinions rejecting contract set-asides on the basis of race. Justice O'Connor's opinion in *Croson* rejected the claim that a city is required to "limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." 488 U.S., at 486 (plurality opinion). Instead, the Justices took the broad view that if a "city could show that it had essentially become a 'passive

participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.*, at 492. In other words, they concluded that a governmental actor even less culpable than the law school could act to remedy the effects of racial discrimination.

Struggling to reconcile the *Croson* opinion with *Hopwood II*'s holding that the law school must ignore the effect of past discrimination in Texas public education on its applicant pool, the court of appeals in *Hopwood III* reached a remarkable conclusion: the law school could have considered race for remedial purposes if it had been a *passive* participant in *private* discrimination, *see Croson*, 488 U.S., at 492, but it was barred from using race because it had instead been an *active* participant in *governmental* discrimination. 236 F.3d, at 274 & n.61. Despite *Hopwood III*'s attempted distinctions, the decision conflicts with *Croson*. By improperly narrowing the scope of possible past discrimination to be remedied, the court of appeals simply refused to consider the law school's evidence of the present effects of past discrimination.

D. Conflicts—In Sum. The Court's long silence on consideration of race in higher education has left conflict and confusion in the lower courts. Various conflicts on specific issues comprise a deeper conflict on the basic question of the constitutionality of affirmative action in higher education, and this case presents the most critical issues of that conflict. At least in the context of a formerly segregated state educational system, the absence of reasonable racial diversity is a form of racial identifiability. Racial identifiability is a measure of segregation and often a consequence of past discrimination, particularly in an educational system that was once segregated *de jure* into two completely separate and unequal educational systems. Diversity, past discrimination, and desegregation are doctrinally distinct, but

they necessarily coexist in the context of a formerly segregated system.

In *Bakke*, the Court held that compelling interests in diversity, or in remedying past discrimination, or at least in the two combined, can justify some consideration of race in professional school admissions. In *Fordice* and other desegregation decisions, the Court took a broad view of the States' authority and responsibility to address the present effects of past *de jure* segregation. The Fifth Circuit took an extraordinarily narrow view of both *Bakke* and *Fordice*, putting itself in conflict with this Court and other circuits. Confusion and conflict now reign with respect to what a State *may* do to cure the effects of past discrimination and achieve reasonable racial diversity. The Court should grant certiorari to begin resolving these conflicts.

II. THIS CASE PRESENTS A CONSTITUTIONAL ISSUE OF GREAT NATIONAL IMPORTANCE.

There is consensus that the issues in this case are of national significance. *See Hopwood*, 518 U.S., at 1033 (Ginsburg, J., concurring in denial of writ of certiorari) (stating that "[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance"); *Smith v. University of Wash.*, No. 00-1341, Pet. for Cert., at 2 (Feb. 21, 2001) (asserting that whether achievement of a diverse student body is a compelling governmental interest is "issue of profound national importance"); *Texas v. Hopwood*, No. 95-1773, Br. for the United States as Amicus Curiae Supporting Petitioners, at 10 (stating that the case "raises issues of national importance that call for this Court's review"). The future of *Bakke* has obvious importance to both public and private colleges and universities across America, and the current inconsistency among the circuits in the law governing admissions programs confirms the continuing national significance of the issues.

The issue is even more important in those States that once operated *de jure* segregated systems of higher education. Sixteen States were sued under Title VI in the long-running *Adams* litigation in the District of Columbia. *See Hopwood A*, 861 F.Supp., at 555-56. These States now operate under a variety of judicial decrees and desegregation plans negotiated with the executive branch, all designed to eliminate racially identifiable institutions of higher education. The judgment below conflicts with many of those plans, and questions about the relationship of affirmative action to desegregation continue to be of profound importance throughout the South.

Hopwood II's effect on racial identifiability was swift and dramatic. In the first class admitted subsequent to that decision, the law school enrolled four black students and 26 Mexican-American students in a class of about 500—one-tenth the number of blacks and fewer than half the number of Mexican-Americans as had enrolled in 1992. *See Hopwood A*, 861 F.Supp., at 554 n.67; Mary Ann Roser, *UT Law School Recoups Some Minority Losses*, AUSTIN AMERICAN-STATESMAN, Aug. 26, 1998, at B1. Massive recruiting efforts have raised those numbers somewhat, to 18 blacks and 34 Mexican-Americans in the 2000 entering class of roughly 500 students, but the law school remains substantially racially identifiable in a State that is more than 40% black and Mexican-American. *See Texas Journal*, WALL ST. J., Sept. 6, 2000, at T1; Texas Comptroller of Public Accounts, Population Forecasts for Texas Counties by Race/Ethnicity 1990-2030, http://www.cpa.-state.tx.us/cgi-bin/poppgm (2000).

The law school has been forbidden to admit highly qualified minority students who approach or approximate but do not exceed the ever-rising threshold for admission in each year's competitive admissions process. It is prohibited from considering race even within the narrow band of academic credentials from which most students are admitted. Many of the brightest minority law students

are wooed to law schools in other States by strong minority admissions and financial aid programs, which remain constitutional elsewhere.

Other consequences of the judgment below are less obvious but equally drastic. The legal and rhetorical force of this Court's desegregation opinions helped make it constitutionally, politically, and socially unacceptable for selective public institutions to be overwhelmingly white. Carefully limited affirmative action plans were the one effective mechanism that enabled selective public universities to pursue the highest academic standards and also achieve some degree of racial diversity.

Now, institutions of higher education have resorted to alternative means in an effort to retain diversity's contributions for their schools. The Texas Legislature responded to *Hopwood II* with well-intentioned legislation that unavoidably has the effect of lowering undergraduate admission standards. TEX. EDUC. CODE §51.803 guarantees admission to any public university in Texas to any student who graduates in the top ten percent of his Texas high school class, without regard to test scores or high school curriculum. And TEX. EDUC. CODE §51.805(c) directs Texas universities to consider "all of, any of, or a combination of" eighteen admissions factors, mostly having nothing to do with academics, in the hope that some of these factors will turn out to be proxies that increase the number of minority students. The University of California, under similar pressure because of state-law prohibitions on considering race, has guaranteed admission to any student in the top four percent of his high school class, and its President has proposed ending the use of the Scholastic Aptitude Test. *See* Diana Jean Schemo, *Head of U. of California Seeks to End SAT Use in Admissions*, N.Y. TIMES, Feb. 17, 2001, at A1; Kenneth R. Weiss, *UC Minority Applications Surge*, L.A. TIMES, Jan. 31, 2001, at B1. Likewise, in the Michigan Law School case, to prevent substantial declines in minority enrollment, the district

court suggested "decreasing the emphasis for all applicants on the undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain number or percentage of the top graduates from various colleges and universities are admitted." *Grutter*, 2001 WL 293196, at *26.

The essence of these approaches is to abandon the pursuit of academic excellence. The law school's interest in avoiding racial identifiability is compelling in itself; it is also inextricably linked to the law school's compelling interest in maintaining the highest possible academic standards. For the last two decades, institutions of higher education have relied on *Bakke* to include race among their considerations in composing student bodies. Wholly eliminating that practice would change the face of American higher education. Whether federal law requires that momentous step is a question of great importance—all the more so in a formerly segregated institution—that should be reviewed by the Court.

III. THIS CASE SQUARELY PRESENTS IMPORTANT ISSUES THAT ARE NOT SQUARELY PRESENTED IN OTHER HIGHER EDUCATION CASES.

Over 25 years ago, the Court remarked in dismissing as moot a case regarding the proper use of race in law school admissions that "there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court." *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). Such a case has had a long-awaited arrival, and academic institutions and the States need guidance from the Court to design their admissions programs constitutionally and put an end to the public doubt, educators' unease, and attacks on various admissions programs. The need for resolution by the Court will not abate, but instead will intensify as these lawsuits proliferate and schools struggle to find fair and acceptable alternatives to race-conscious admissions.

Other pending cases present *some* of the issues presented in this case. Several pending cases present the important question whether diversity in higher education is a compelling governmental interest. But for now, and for some time to come, only this case squarely presents the equally important issue of whether remedying the effects of past discrimination is a compelling interest in the context of admissions to higher education.

Smith v. University of Washington Law School, No. 00-1341, presents the diversity issue. But Washington's educational system was never *de jure* segregated, and no issue of past discrimination is presented either in the petition or in the opinion below. At the very least, the Court should hold this case if it grants in *Smith*. If *Smith* is affirmed, the "judicial instruction" in this case would have to be reversed. But if *Smith* is reversed, or if the *Smith* petition is denied, important issues in this case would remain to be decided.

The University of Michigan cases, now pending in the Sixth Circuit, present the spectacle of conflicting decisions within the same campus. *See Grutter v. Bollinger*, 2001 WL 293196 (E.D. Mich. Mar. 27, 2001); *Gratz v. Bollinger*, 122 F.Supp.2d 811 (E.D. Mich. 2000); *Grutter v. Bollinger*, No. 01-1447, 2001 WL 327822 (CA6 Apr. 5, 2001) (granting a stay). But they too present only some of the important issues presented here. The university has defended each case on the ground of diversity, but it has not defended either case on grounds of past discrimination or desegregation. *Gratz*, 122 F.Supp.2d, at 816 n.5; *Grutter*, 2001 WL 293196, at *11-*12.[2] The same is true in the University of Georgia

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[2]Intervenors have raised issues in the Michigan cases that the *Grutter* court described as involving "societal discrimination." The *Grutter* court rejected the arguments, *see* 2001 WL 293196, at *42 ("[T]here has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination."), and similar issues raised by intervenors in *Gratz* are still pending in the district court. 122

case. *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F.Supp.2d 1362, 1369 & n.5 (S.D. Ga. 2000) (stating that Georgia makes "no . . . claim" that its affirmative action efforts are "necessitated by the lingering effects of past discrimination") (quotation omitted).

The issues presented here are of critical importance to higher education in Texas, yet they cannot again arise in Texas—because the State's entire educational system is complying with the court of appeals's "judicial instruction." To do otherwise involves the risk of large litigation costs, substantial liability for attorneys' fees, the actual and punitive damages threatened in *Hopwood II*, and the opprobrium of a state institution defying a clear directive from the federal courts. It has taken this case nine years to get here; the Court should not lightly assume that some other case, not yet pending, will soon be filed in some other southern state, that it will be fully litigated, that it will develop all the issues raised in this case, that those issues will be presented on the basis of a detailed record from twelve days of trial, and that it will reach this Court in a timely fashion. The issues presented are important, they are well developed, and they should be decided now.

IV. THE COURT OF APPEALS'S JUDICIAL PROHIBITION OF ANY CONSIDERATION OF RACE IN ADMISSIONS SHOULD NOW BE REVIEWED.

This Court denied a petition for certiorari in this case five years ago, with two Justices noting that the Court needed to be presented with an admissions program genuinely in controversy and a challenge to the lower court judgment before addressing the questions presented. *See Texas v. Hopwood*, 518 U.S. 1033 (1996); *id.* (Ginsburg, J., concurring). That time has now arrived.

F.Supp.2d, at 814 n.3. Whatever issues intervenors may present in the Michigan cases, they will not present the extent or degree of discrimination that is a recent part of educational history in Texas.

It is of course settled that neither the earlier denial of certiorari nor the earlier and unreviewed opinions of the court of appeals preclude review in this Court. This Court has full power to review *Hopwood III* and any part of the judgment in *Hopwood II* on which *Hopwood III* depends. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995) (reviewing question decided by court of appeals on prior appeals, on which Court had previously denied certiorari); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 881 & n.1 (1990) (reviewing question decided by court of appeals on prior appeal).

Petitioners challenge the judgment of the court of appeals reaffirming the court's "judicial instruction" that the law school may not consider race in admissions decisions. If the Court decides that one or more of the State's compelling governmental interests justifies some limited consideration of race in admissions, then the law school will again consider race along with the many other factors now considered in the admissions process.[3] The court of appeals's "judicial instruction" presents the issues in the same absolute terms as the injunction in *Bakke* (and in the district

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[3]The current admissions policy considers, beyond the LSAT and GPA:

> "the rigor of the undergraduate course of study as reflected by the applicant's college transcripts, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, disadvantaged socio-economic background, geographic diversity (particularly underrepresented regions of Texas), diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, exceptional personal talents, and other factors." The Univ. of Tex. School of Law Application and Admissions Bulletin, p.38 (2001).

court)—whether any consideration of race, however limited and however administered, is absolutely prohibited.

The court of appeals's "judicial instruction" was in every practical respect a *de facto* injunction or declaratory judgment. Defendants, plaintiffs, and the courts below have all treated it as such. The court of appeals's "judicial instruction" is not something that must be gathered from contestable analysis of a discursive opinion. It was stated, three times, with all the precision of an injunction or declaratory judgment:

> "[T]he University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the community, or to eliminate any present effects of past discrimination by actors other than the law school." *Hopwood II*, 78 F.3d, at 962.

The instruction is repeated verbatim and reaffirmed in *Hopwood III*. 236 F.3d, at 273-74. In each repetition, the party subject to the order is named, the forbidden conduct is identified, and the prohibited justifications are listed. The judicial instruction is backed by an explicit threat of penalties. *See Hopwood II*, 78 F.3d, at 959. Judge Wiener noted that the instruction "has all of the substantive earmarks of an injunction" and that it "constitutes a de facto injunction . . . albeit without the use of the word injunction." *Id.*, at 966-67 (Wiener, J., concurring).

Defendants treated this "judicial instruction" as an injunction; they have complied for five years and will continue to do so until the instruction is vacated or superseded. Plaintiffs, too, treated the "judicial instruction" as an injunction that gave them all the prospective relief they wanted. At the first trial and on the first appeal, they sought an injunction against any use of race. *Hopwood*

II, 78 F.3d, at 955, 957-58. But once they obtained *Hopwood II*'s "judicial instruction," they opposed any attempt to implement it with a formal injunction. When the district court on remand issued the very injunction plaintiffs had originally requested, plaintiffs appealed. They argued that "[t]his Court [the court of appeals] has already set forth the limitations on defendant's conduct, 78 F.3d at 958, and accordingly the Court should vacate the injunction as it corrects the district court's other errors." *Hopwood III* Reply Brief & Brief in Opp. of Plaintiffs Hopwood & Carvell, at 43. The transparent purpose of this argument was to render more difficult any further review of the "judicial instruction."

The courts below also treated the "judicial instruction" as either an injunction or declaratory judgment—a formal judgment sufficient to support a substantial award of attorneys' fees. In *Hopwood II*, the court of appeals, in its judgment order, instructed that fees be awarded on remand. *See Hopwood III*, 236 F.3d, at 278 n.81. The district court awarded substantial fees because:

> "plaintiffs attained extraordinary success in the appellate courts. The plaintiffs accomplished the principal goal of the lawsuit—to dismantle all forms of racial preferences in public higher education in Texas." *Hopwood B*, 999 F.Supp., at 916.

The court of appeals affirmed the fee award on the same ground. *Hopwood III*, 236 F.3d, at 278.[4]

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[4]Plaintiffs were also awarded nominal damages of $1 each. *Hopwood B*, 999 F.Supp., at 923. This relief cannot support a fee award of $704,000, *see Farrar v. Hobby*, 506 U.S. 103, 114-16 (1992), and these substantial fees were not awarded on that basis. If nominal damages are the only relief, "the only reasonable fee is usually no fee at all." *Id.*, at 115.

In awarding substantial fees on this ground, the courts below necessarily treated the "judicial instruction" as a judgment, for it is settled that a mere statement of law in a judicial opinion cannot support a fee award. *See Hewitt v. Helms*, 482 U.S. 755, 759-63 (1987). Nor could this fee award be supported by the catalyst theory now before the Court in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources Dep't*, No. 99-1848. In the catalyst cases, the lawsuit "produces *voluntary* action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment." *Hewitt*, 482 U.S. at 760 (emphasis added). The law school, by contrast, has complied only under the coercive threat of a "judicial instruction" that it has persistently sought to appeal for five years. If the "judicial instruction" can support a fee award, it is only because it is for all practical purposes a judgment.

Even in cases appealed under 28 U.S.C. §1292(a)(1), where an order granting, denying, or modifying an injunction is essential to jurisdiction, this Court has recognized that form is not dispositive, and that orders with all the practical consequences of an injunction will support appellate jurisdiction. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981) ("Although the District Court's order declining to enter the proposed consent decree did not in terms 'refus[e]' an 'injunctio[n],' it nevertheless had the practical effect of doing so.").

In addition, the judgment below fully satisfies the purposes of the prudential rule that "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).[5] The rule is one of substance, not of form. Its purpose is not to insulate judgments

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[5]The rule is not jurisdictional in appeals from federal courts of appeals; 28 U.S.C. §1254(1) does not require that there even be an appellate judgment to support jurisdiction in this Court.

from review in this Court, but rather to focus review on what the court below did and not on the reasons it gave. The rule means that "where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." *J.E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59 (1940). In *Chevron*, the question was whether a concededly erroneous opinion had "resulted in an erroneous judgment on the validity of the regulations." 467 U.S., at 842.

Both this Court and the States have a strong interest in full appellate review of judgments striking down state laws and state programs. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Court reviewed a judgment invalidating a municipal ordinance, even though the business challenging the ordinance had closed and its owner had retired to Florida. The Court explained that the city had an ongoing injury from the unreviewed judgment: "If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot." *Id.*, at 288. The business's attempt to preserve its judgment by mooting the case triggered the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Id.* The Court reiterated these concerns in *City News and Novelty, Inc. v. City of Waukesha*, holding moot on similar facts a case in which the city had prevailed. 121 S.Ct. 743 (2001). The Court explained that dismissal of the writ of certiorari did not "keep Waukesha under the weight of an adverse judgment," or "reward an arguable manipulation of our jurisdiction," because it was the losing party who mooted the case by ceasing the conduct potentially in violation of municipal code. *Id.*, at 747 & n.1.

The same principles apply in this case. An important state policy has been terminated, and any implementing program prohibited, by a "judicial instruction" from the court of appeals.

The law school cannot remain forever bound by a decree that is binding for all purposes except appellate review.

If the court of appeals's "judicial instruction" is *not* reviewable in this Court, other consequences follow. The award of attorneys' fees should be summarily reversed on the merits, for if the three repetitions of the "judicial instruction" are mere statements in opinions, they cannot support a fee award. *See Hewitt*, 482 U.S., at 759-63. More fundamentally, if it was not a binding judgment, the judicial instruction itself should be vacated, because as it now stands, it has all the effect of a judgment. In cases where the lack of a formal injunction defeats appellate jurisdiction, this Court has vacated and remanded "with instructions to enter a fresh decree from which the parties may take an appeal," *Perez v. Ledesma*, 401 U.S. 82, 88 (1971), or pointedly advised the district court to "now take formal action of sufficient precision and clarity to insure to any aggrieved party the availability of an appeal." *Gunn v. Univ. Comm. To End War*, 399 U.S. 383, 390 n.6 (1970).

If on such a remand, plaintiffs continue to disclaim any desire for an injunction, then their claim to prospective relief must be dismissed. Their damages claims have all been adjudicated; they now have standing only to the extent that they "challenge[] an ongoing race-conscious program and seek[] forward-looking relief." *Texas v. Lesage*, 528 U.S. 18, 21 (1999). If plaintiffs no longer seek "forward-looking relief," their claim to such relief would be moot. When federal judgments become unreviewable because of mootness, "the established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

On the facts of this case, the rationale of *Arizonans* and *Munsingwear*—that petitioners in the Court should not be bound by a judgment that has become unreviewable through no fault of their

own—requires that each appearance of the "judicial instruction" in this case be vacated. *See Arizonans*, 520 U.S., at 71-72. 75; *Munsingwear*, 340 U.S., at 39-41. The law school is in precisely that situation until the "judicial instruction" below is either reviewed or vacated. When the Court denied certiorari in 1996, it had every reason to expect that either the judgment below had not attempted to grant prospective relief or that, if it had, the courts below would promptly embody that prospective relief in a properly appealable injunction or declaratory judgment. That reasonable expectation having been disappointed, the only possible remedies now are either to treat the "judicial instruction" as an appealable order, or to vacate its appearances in *Hopwood II* as well as in *Hopwood III*.

CONCLUSION

The petition should be granted. In the alternative, the award of attorneys' fees should be summarily reversed and the "judicial instruction" to end consideration of race in admissions should be vacated and remanded with instructions to dismiss or to enter a properly appealable judgment. If the petition is granted in *Smith v. University of Washington Law School*, No. 00-1341, then this case should be held.

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